UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

TYCO INTERNATIONAL, LTD. and TYCO INTERNATIONAL (US), INC., Plaintiffs/Counterclaim Defendants, v. L. DENNIS KOZLOWSKI, Defendant/Counterclaim Plaintiff.	No. 02 Civ. 7317 (TPG) **ECF CASE** Oral Argument Requested

MEMORANDUM OF LAW OF DEFENDANT/COUNTERCLAIM PLAINTIFF L. DENNIS KOZLOWSKI IN SUPPORT OF HIS MOTION FOR CERTIFICATION FOR INTERLOCUTORY APPEAL PURSUANT TO 28 U.S.C. § 1292(b) AND ENTRY OF PARTIAL FINAL JUDGMENT PURSUANT TO FED. R. CIV. P. 54(b)

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Defendant/Counterclaim Plaintiff L. Dennis Kozlowski respectfully submits this memorandum of law in support of his motion requesting the Court to (*i*) certify for interlocutory appeal, pursuant to 28 U.S.C. § 1292(b), the Court's December 1, 2010 opinion (the "Opinion") and (*ii*) direct entry of final judgment, pursuant to Fed. R. Civ. P. 54(b), on Mr. Kozlowski's counterclaims against Plaintiffs/Counterclaim Defendants Tyco International, Ltd. and Tyco International (US), Inc. (collectively, "Tyco").

PRELIMINARY STATEMENT

On December 1, 2010, this Court issued its Opinion ruling on the parties' cross-motions for summary judgment. The Opinion dismissed essentially all of Mr. Kozlowski's counterclaims and granted summary judgment to Tyco on the major portion of its affirmative claims, including on its claim for disgorgement of all compensation earned by Mr. Kozlowski over almost seven years – a remedy which, indisputably, exceeds Mr. Kozlowski's current net worth.

Respectfully, Mr. Kozlowski submits that the Opinion hinged on a discrete error of law which is ripe for review. Specifically, as the Court itself recognized, the Opinion hinged upon the Court's determination that New York law should apply to Tyco's claims and Mr. Kozlowski's counterclaims based on Mr. Kozlowski's conviction in New York on certain crimes relevant to this case. The Court based its determination that the substantive law of New York should apply in this civil action on the fact that the jury in the criminal case found that the crimes occurred in "New York County and elsewhere." But this jury finding was nothing more than confirmation that the minimal threshold required to establish criminal jurisdiction had been satisfied. The criminal jury was not asked to consider, and did not make any findings about, how much of the relevant conduct occurred in New York versus other jurisdictions. It certainly did not determine that the conduct was centered in New York.

Nevertheless, the Court held that "it is reasonable to conclude, for the purposes of the present civil action, that the wrongdoing was centered in New York." Opinion at 7. The Court was explicit that it could reach this conclusion without reviewing the entire criminal record (which was not before the Court in any event), much less facts outside the criminal record. *Id.* Rather, the Court held that the conclusion – that the wrongdoing was centered in New York – followed from the criminal jury's confirmation that the requirements for criminal jurisdiction in New York were satisfied. *Id.* at 7-8. In effect, the Court equated the presence of criminal jurisdiction in New York with a legal presumption that the substantive law of New York should govern civil claims in a related lawsuit. Mr. Kozlowski respectfully submits that this was an error of law.

An immediate review of the Opinion will serve the interests of efficiency and judicial economy. Absent an immediate appeal of the Opinion, the Court and the parties will be forced to proceed with an expensive trial on the relatively inconsequential issues remaining after the Opinion. The prospects for settlement before appeal are dim given the Opinion's extreme impact on the parties' respective bargaining positions: Mr. Kozlowski's counterclaims have been virtually erased and Tyco is armed with judgment on a claim with a value in excess of Mr. Kozlowski's current net worth. Practically speaking, Mr. Kozlowski will have no choice but to continue to litigate until he can appeal the Opinion. But trial of the remaining issues, while it would consume time and the resources of the parties and the Court, would have little practical significance in light of what has already been decided by the Opinion. Under the Opinion, absent appeal, Mr. Kozlowski already owes Tyco more than he is worth, and a trial of the remaining issues would only determine if his net worth will be pushed even further below zero.

Interlocutory appeals under Section 1292(b) are appropriate and frequently permitted in situations like this where an interlocutory order (*i*) presents a discrete legal issue that is fully ripe for review, (*ii*) about which there is substantial ground for difference of opinion, and (*iii*) the resolution of which will materially advance the ultimate termination of the litigation. The Court's analysis, which, in effect, equated the presence of criminal jurisdiction in New York with choice of New York substantive law on civil claims in a related case, presents a discrete legal issue that is as ripe for review as it ever will be. The holding is contrary to legal authority and there is, accordingly, substantial ground for reversal by the Second Circuit. Finally, the resolution of the issue at this time will advance ultimate termination of the case. Absent an interlocutory review, Mr. Kozlowski, Tyco and the Court will need to proceed with an expensive and complicated trial involving relatively inconsequential issues before Mr. Kozlowski can seek the inevitable review of the truly important issues resolved by this Court's Opinion. If the appeal is successful, the first trial will have been a wasted effort.

It is also appropriate to enter final judgment under Rule 54(b) as to the Court's dismissal of Mr. Kozlowski's counterclaims under the Opinion. The dismissal of the counterclaims is a final judgment on a discrete set of claims that are not intertwined with the remaining issues to be tried. There is no just reason to delay entry of final judgment as to those claims. To the contrary, as described above with respect to Section 1292(b), entry of final judgment – permitting an immediate appeal – will advance the just and efficient resolution of this case.

BACKGROUND

The Cross Motions for Summary Judgment

In this action, Tyco sued Mr. Kozlowski, its former chief executive officer, for breach of fiduciary duty, fraud, breach of contract and a variety of other claims. Mr. Kozlowski asserted counterclaims seeking to vindicate his rights under various severance agreements and deferred compensation plans.

Tyco moved for summary judgment establishing liability on all of its claims and dismissing all of Mr. Kozlowski's counterclaims. Mr. Kozlowski moved for summary judgment on two of his counterclaims: (1) seeking payment of deferred compensation owed under his Executive Retirement Agreement, and (2) seeking indemnification in a class action (the TyCom action) which he and Tyco agreed was wholly unrelated to the conduct underlying Mr. Kozlowski's criminal convictions. On December 1, 2010, the Court issued its Opinion granting partial summary judgment to Tyco as to liability on many of its affirmative claims, dismissing virtually all of Mr. Kozlowski's counterclaims and denying Mr. Kozlowski's motion for partial summary judgment in its entirety.

The Opinion's Choice-of-Law Analysis

As the Court itself recognized, the key issue determining the cross-motions for summary judgment was whether New York law should apply and what effect the criminal convictions should have on the choice-of-law analysis. Opinion at 2 ("There are two issues that mainly determine the outcome of all the motions. The first is choice of law. The second is collateral estoppel."); *see also id.* at 9 ("Tyco's motion turns largely on issues of choice of law and collateral estoppel."). Tyco contended that New York law should apply, and Mr. Kozlowski contended that Bermuda law should apply. Although the Court correctly held that "[t]o resolve a conflict of law, it must be determined which jurisdiction has the greatest concern in the issues raised in the litigation," *see id.* at 10, its analysis of that question was flawed.

The Court expressly found it unnecessary to review the record of the criminal trial (which was not, in any event, before the Court) to determine whether the alleged "wrongful conduct was centered in New York." *Id.* at 7. The Court also did not review relevant facts outside the record of the criminal trial. Instead, the Court based its holding on the fact that each count of the criminal indictment alleged that the wrongdoing occurred in "New York and elsewhere" and that the criminal jury was instructed that on each count they had to find that the charged conduct occurred in "in the county of New York and elsewhere." *Id.* at 7-8. Although the Opinion did mention a few facts in the record touching on New York, such as that one of the 23 counts of conviction "related to New York," *see id.* at 8, the Opinion was explicit that it was not based on a comprehensive review of the criminal record, much less a review of facts outside the criminal record, to determine the extent to which the alleged conduct touched on New York versus other jurisdictions.

The allegations in the indictment and jury instructions on which this Court relied to support its choice-of-law analysis were aimed at satisfying the minimal requirements of criminal jurisdiction in the criminal case. Indeed, the language from the jury instructions cited by this Court came from the portion of the instructions in which the judge presiding over the criminal trial instructed the jury on the concept of criminal jurisdiction. Edwards Decl. Ex. 2, Jury

Charge, at 16094-98.[1] That portion of the charge, read in its totality, demonstrates how minimal the nexus with New York needed to be in order to satisfy jurisdiction. *Id.* The jury was instructed that in order to obtain a conviction, the prosecution had to show that *either* Mr. Kozlowski *or another person* for whose conduct Mr. Kozlowski was accessorily liable had engaged in conduct in New York that constituted an element of each offense charged. *Id.* Moreover, the jury was instructed that it could find that New York had jurisdiction even if Mr. Kozlowski *had never acted in New York*, if it found that *he or someone else* for whom he was accessorily liable had communicated *to* New York while such person was in another jurisdiction. *Id.*

New York's "Faithless Servant" Doctrine

The impact of the Court's decision to apply New York law cannot be overstated. Most significant, as a result of its choice-of-law analysis, the Court held that New York's "faithless servant" doctrine applied to Tyco's claims and Mr. Kozlowski's counterclaims. Opinion at 18, 23-24. Mr. Kozlowski argued strenuously that Bermuda law did not recognize the "faithless servant" doctrine or any equivalent. The Court did not disagree. *Id.* at 10 (holding that there was a potential conflict between New York and Bermuda law, necessitating a choice-of-law analysis, because "it is difficult to determine whether such a remedy or defense under Bermuda law would apply to a case, such as the instant one, involving a corporate officer").

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[1] *See* Declaration of Elizabeth F. Edwards and Exhibits in Support of Tyco's Motion for Partial Summary Judgment on Liability and Defendant's Counterclaims, dated March 4, 2010 (Docket Nos. 46-51) ("Edwards Decl."), Ex. 2, Jury Charge Transcript, dated June 2, 2005 in *People v. Kozlowski and Swartz*, Supreme Court, New York County, No. 5259/02 ("Jury Charge") at 16094-98.

As to Tyco's affirmative claims, the Court held that the "faithless servant" doctrine required Mr. Kozlowski to "forfeit all compensation earned" from "September of 1995 until Kozlowski's dismissal in June 2002." *Id.* at 18-19. In addition, the Court held that the "faithless servant" doctrine could be used not only as a "sword" but also "as a shield to Kozlowski's counterclaims." *Id.* at 23. As a result, the Court held that Tyco has no "obligation to honor" any compensation agreements made from, at the latest, September 1995 to the present. *Id.* at 24. In sum, the effect of applying New York's "faithless servant" doctrine is that Mr. Kozlowski can achieve virtually no recovery on his counterclaims and that Tyco is entitled to a disgorgement remedy that has value indisputably in excess of Mr. Kozlowski's current net worth.

Issues Remaining in the District Court

After the Opinion, there are a number of issues remaining to be tried. Although many of these issues will involve complex legal and factual questions, thus necessitating an involved pre-trial process, voluminous *in limine* motion practice and a lengthy trial, the practical significance of the open issues pales in light of the significance of what has already been decided.

On Mr. Kozlowski's counterclaims, he may still try to prove that he is entitled to recovery of any contributions he made to the Deferred Compensation Plan ("DCP") between March 1994 and September 1995 and of any contributions he made to the Supplemental Executive Retirement Plan ("SERP") between January and September of 1995. *Id.* at 3, 26. Even if Mr. Kozlowski is successful in recovering these contributions, his current net worth will still be far less than the value of the disgorgement remedy obtained by Tyco pursuant to the Opinion.

On Tyco's affirmative claims, there are a number of open issues to be tried that have the potential to push Mr. Kozlowski's net worth even further below zero. Among these open issues are the precise dollar value of the disgorgement remedy, whether Tyco is entitled to any damages beyond the disgorgement remedy, whether Tyco can prove reliance in support of its fraud claim, whether Tyco can prove that Mr. Kozlowski caused Tyco to incur defense costs in numerous other lawsuits for which it seeks contribution, and whether damages are an inadequate remedy such that Tyco is entitled to equitable remedies including on its claims for an accounting, imposition of a constructive trust and unjust enrichment.

ARGUMENT

I. The Opinion Should Be Certified For Immediate Interlocutory Appeal Pursuant To Section 1292(b).

Section 1292(b) certification is appropriate when an order (*i*) "involves a controlling question of law," (*ii*) "as to which there is substantial ground for difference of opinion," and (*iii*) "an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). All of these requirements are satisfied here.

A. The Opinion Involves A Controlling Question of Law.

1. The Opinion Presents A Purely Legal Question.

As required under Section 1292(b), the Opinion presents a "question of law that the reviewing court could decide quickly and cleanly without having to study the record." *Consub Del. LLC v. Schahin Engenharia Limitada*, 476 F. Supp. 2d 305, 309, 313 (S.D.N.Y. 2007) ("The first prong of section 1292(b) is met because the . . . issue can be decided with minimal, if any, reference to the record."). That question is:

> Was it error for the District Court to hold that New York was the center of gravity of wrongdoing alleged in a civil case based on the fact that the defendant was convicted of crimes in a New York proceeding and the criminal jury found, for purposes of establishing criminal jurisdiction, that the crimes occurred "in New York and elsewhere"?

This is the sole question the Court of Appeals would need to answer, and it could be decided without reference to any procedural history or reference to the record on the cross-motions for summary judgment.

Certifying the Opinion on the basis of this question would be consistent with numerous precedents within this Circuit recognizing that choice-of-law rulings are questions of law appropriate for Section 1292(b) certification. *See, e.g., Groucho Marx Prod., Inc. v. Day & Night Co.*, 689 F.2d 317 (2d Cir. 1982) (district court found that New York law controlled, granted partial summary judgment for plaintiffs, and certified ruling under Section 1292(b); Court of Appeals accepted certification and reversed, holding that California law applied); *Rosenthal v. Warren*, 475 F.2d 438 (2d Cir. 1973) (applying New York law, district court granted plaintiff partial summary judgment, striking defendant's affirmative defense, and certified choice-of-law issue for appeal pursuant to Section 1292(b); Court of Appeals accepted certification and affirmed); *Junco v. E. Air Lines, Inc.*, 399 F. Supp. 666 (S.D.N.Y. 1975) (certifying choice-of-law question under Section 1292(b)), *aff'd* 538 F.2d 310 (2d Cir. 1976); *In re Air Crash off Long Island, N.Y. on July 17, 1996*, 27 F. Supp. 2d 431 (S.D.N.Y. 1998) (same); *see also Simon v. United States*, 341 F.3d 193, 199 (3d Cir. 2003) (finding "choice-of-law is a purely legal determination" and that "[b]ecause the choice-of-law issues are so critical, the Court certified them for our immediate review pursuant to 28 U.S.C. § 1292(b)").

2. The Legal Question Is Controlling.

Whether New York law – and thus New York's "faithless servant" doctrine – applies is controlling for the purposes of Section 1292(b).

In the Second Circuit, "[t]here is no doubt that a question is 'controlling' if its incorrect disposition would require reversal of a final judgment for further proceedings . . . ." *Teletronics Proprietary, Ltd. v. Medtronic, Inc.*, 690 F. Supp. 170, 172 (S.D.N.Y. 1987) (internal quotations omitted); *see also In re Air Crash off Long Island*, 27 F. Supp. 2d at 435 (finding question controlling because its immediate appeal would "significantly affect the conduct of the action" by "eliminating the threat of reversal by the Second Circuit after final judgment"). That is unquestionably the case here. For example, if, after trial, the Court entered final judgment on its Opinion requiring Mr. Kozlowski to disgorge compensation pursuant to New York's "faithless servant" doctrine and the Second Circuit subsequently determined that New York law should not have been applied, the judgment would have to be reversed and the case remanded for further proceedings. That is true regardless of the outcome of the trial. In addition, if the Second Circuit determined that New York law should not have been applied, further proceedings would be necessary because all of Mr. Kozlowski's counterclaims would be revived and further proceedings on them would be necessary as well.

A question is controlling for the purposes of Section 1292(b) if it "could materially affect the outcome of the case." *N.Y. Racing Ass'n v. Perlmutter Publ'g*, 959 F. Supp. 578, 583 (N.D.N.Y. 1997); *see also In re Duplan Corp.*, 591 F.2d 139, 148 n.11 (2d Cir. 1978) ("[A] determination that may importantly affect the conduct of an action" is a "controlling question of law"). For example, a "ruling is clearly 'controlling'" if it "would certainly have a decisive effect upon the amount of the recovery." *Junco,* 399 F. Supp. at 667. Here, no issue has a greater effect on the case or the amount of recovery than the choice-of-law question at issue. Because the Court applied the New York "faithless servant" doctrine, Mr. Kozlowski's counterclaims have been dismissed and Tyco has been granted recovery of all compensation paid to him from September 1995 forward – a remedy exceeding Mr. Kozlowski's current net worth.

B. There Is Substantial Ground For Difference Of Opinion.

"'[S]ubstantial ground for a difference of opinion' must arise out of a genuine doubt as to whether the district court applied the correct legal standard in its order." *Consub,* 476 F. Supp. 2d at 309. In making this determination, "it is the duty of the district judge to analyze the strength of the arguments in opposition to the challenged ruling." *In re Flor,* 79 F.3d 281, 284 (2d Cir. 1996) (internal quotations omitted). The Court can be "confident that it has come to the proper conclusions," yet find that there is "room for difference of opinion" sufficient to satisfy this requirement. *N.Y. Racing Ass'n,* 959 F. Supp. at 584.

Here, the Court based its choice-of-law analysis on an erroneous legal proposition: Finding it unnecessary to review the criminal record or relevant facts outside the criminal record, the Court effectively applied a legal presumption that New York was the "center of gravity" of civil claims based on the fact that a jury confirmed that criminal jurisdiction was present in New York in a related criminal proceeding. The Court equated the criminal jury's finding that the alleged wrongful conduct occurred "in the County of New York and elsewhere" with a presumption that the "wrongdoing was centered in New York." Opinion at 7-8, 12.

Such a presumption is unsupportable. The criminal jury did not conclude that New York was the central place of the crimes for which Mr. Kozlowski was convicted. Indeed, the criminal jury was not even asked to consider that question. The jury made no finding about where the wrongful conduct primarily occurred. That was not an issue litigated in the criminal case or relevant to the criminal proceedings (once the minimal threshold for establishing jurisdiction was satisfied). Moreover, the relevant portion of the jury charge, read in its totality, demonstrates that the jury was instructed that it did not have to find that Mr. Kozlowski committed any act in New York whatsoever. Edwards. Decl. Ex. 2, Jury Charge, at 16094-98. A mere communication made to someone in New York by someone for whom Mr. Kozlowski was accessorily liable would have been sufficient. *Id.* Accordingly, the jury's finding that wrongful conduct occurred "in the county of New York and elsewhere" was merely confirmation that the minimal requirements for criminal jurisdiction had been met. It was not a finding that the alleged wrongdoing was centered in New York.

Equating the presence of criminal jurisdiction with substantive choice-of-law in a related civil lawsuit was a fundamental legal error unsupported by any precedent. The two analyses are entirely different. Criminal jurisdiction can be present where the majority of events relating to a crime occurred outside of New York. *See, e.g.*, N.Y. C.P.L. § 20.20(1)(a) (criminal jurisdiction requires finding that defendant, or one for which the defendant is legally accountable, performed conduct in New York "sufficient to establish . . . [a]n element of [the] offense"); *People v. Kassebaum*, 744 N.E.2d 694, 698-99 (N.Y. 2001) (holding that criminal jurisdiction was present in New York even though key acts took place outside New York and connection to New York was minimal); *People v. Carvajal*, 786 N.Y.S.2d 450, 14 A.D.3d 165, 170-71 (N.Y. App. Div.

1st Dep't 2004) (same), *aff'd*, 845 N.E.2d 1225 (2005); *People v. Winley*, 432 N.Y.S.2d 429, 431-32 (N.Y. Sup. Ct. 1980) (same). Choice-of-law, by contrast, requires a court to determine a dispute's "center of gravity." *See, e.g., Miller v. Miller*, 237 N.E.2d 877, 22 N.Y.2d 12, 15-16 (N.Y. 1968); *Babcock v. Jackson*, 191 N.E.2d 279, 12 N.Y.2d 473, 479 (N.Y. 1963); *GFL Advantage Fund, Ltd. v. Colkitt*, 03 Civ. 1256 (JSM), 2003 U.S. Dist. LEXIS 10643, at *8 (S.D.N.Y. June 24, 2003).

By equating the criminal jury's finding that the wrongful conduct occurred "in the county of New York and elsewhere" with a presumption that the "wrongdoing was centered in New York," *see* Opinion at 7-8, the Court disregarded several factors critical to an appropriate choice-of-law analysis:

- The Court's erroneous legal presumption allowed the Court to disregard the undisputed facts that Tyco was never incorporated in New York and never had its principal place of business in New York, but rather was incorporated in Bermuda and had its principal place of business in Bermuda for most of the relevant period.

- The presumption allowed the Court to disregard the undisputed fact that Mr. Kozlowski was never domiciled in New York.

- The presumption allowed the Court to distinguish, on legally erroneous grounds, the "internal affairs" doctrine, which provides that claims arising from alleged breaches of fiduciary duty by a corporate officer or director are governed by the law of the state of incorporation – Bermuda in this case. *See, e.g., Walton v. Morgan Stanley & Co., Inc.*, 623 F.2d 796, 798 n.3 (2d Cir. 1980) ("New York law dictates that the law of the state of incorporation governs an allegation of breach of fiduciary duty owed to a corporation.") (citation omitted); *Buckley v. Deloitte & Touche USA LLP*, No. 06 Civ. 3291 (SHS), 2007 WL 1491403, at *13 (S.D.N.Y. May 22, 2007) (under the internal affairs doctrine a claim involving a "breach of fiduciary duty owed to a corporation is governed by the law of the state of incorporation"); *BBS Norwalk One, Inc. v. Raccolta, Inc.*, 60 F. Supp. 2d 123, 129 (S.D.N.Y. 1999) ("Consistent with the internal affairs doctrine, a claim of breach of fiduciary duty owed to a corporation is governed by the law of the state of incorporation.") (citation omitted); *Winn v. Schafer*, 499 F. Supp. 2d 390, 393 (S.D.N.Y. 2007) (same); *City of Sterling Heights Police & Fire Ret. Sys. v. Abbey Nat'l, PLC*, 423 F. Supp. 2d 348, 363-64 (S.D.N.Y. 2006) (same).

- Although the Court noted correctly that Tyco's claims should be classified as "conduct regulating" torts for purposes of choice-of-law analysis, *see* Opinion at 11-12, the Court's erroneous legal presumption allowed the Court to distinguish, on legally erroneous grounds, the well settled principles that, for conduct regulating torts, the law of the place where the injury was inflicted will generally apply and that the place where the "injury is deemed to have occurred" is almost always "where the plaintiff is located" – Bermuda in this case. *See, e.g., Odyssey Re (London) Ltd. v. Stirling Cooke Brown Holdings Ltd.*, 85 F. Supp. 2d 282, 292 (S.D.N.Y. 2000); *Telecom Int'l Am., Ltd. v. AT & T Corp.*, 67 F. Supp. 2d 189, 207 n.16 (S.D.N.Y. 1999).

- The presumption allowed the Court to disregard the undisputed fact that Tyco itself has argued successfully on more than one occasion that, pursuant to the "internal affairs" doctrine, Bermuda law should apply to actions in which shareholders sought to pursue Tyco's breach of fiduciary duty and related fiduciary-based claims against Mr. Kozlowski as derivative claims based on the same allegations advanced by Tyco in this case. *See In re Tyco Int'l Ltd.*, 340 F. Supp. 2d 94, 96 n.2 (D.N.H. 2004); *Levin v. Kozlowski*, No. 602113/02, 2006 WL 3317048, at *3 (N.Y. Sup. Ct. Nov. 14, 2006), *aff'd* 846 N.Y.S.2d 37 (N.Y. App. Div. 1st Dep't 2007).

- The presumption allowed the Court to distinguish, on legally erroneous grounds, a recent decision (now on appeal by Tyco to the Second Circuit) in which Judge Cote applied Bermuda (rather than New York) law to fiduciary breach claims by Tyco based on the exact same transaction that underlies one of the most significant claims against Mr. Kozlowski in this case and was the basis for one of Mr. Kozlowski's criminal convictions. *Tyco Int'l Ltd. v. Walsh*, No. 02 Civ. 4633 (DLC), 2010 WL 4118074 (S.D.N.Y. Oct. 20, 2010).

Because the legal presumption applied by the Court was unprecedented, and contrary to black letter law, there is substantial ground for difference of opinion. *See Longo v Carlisle De Coppet & Co.*, 537 F.2d 685, 685 (2nd Cir. 1976) (substantial ground for difference of opinion was satisfied when a trial court's ruling appeared contrary to established law).

C. Interlocutory Appeal May Materially Advance The Ultimate Termination Of The Litigation.

Certification under Section 1292(b) will "materially advance the ultimate termination" of this case. First of all, an immediate appeal will allow the Court and the parties to avoid expending resources on an unnecessary trial. Absent an interlocutory appeal, the parties and the Court will have to proceed with a complex, but relatively inconsequential, trial on the remaining issues before Mr. Kozlowski is finally able to appeal the far more consequential issues that have been determined by the Opinion. If his appeal is successful, the first trial will have been a complete waste. *See, e.g., In re Dynex Capital, Inc. Sec. Litig.*, No. 05 Civ. 1897 (HB), 2006 U.S. Dist. LEXIS 35386, at *9 (S.D.N.Y. June 2, 2006) (interlocutory review is appropriate when "substantial resources may be expended in vain both by the parties and this Court if [the Court's] initial conclusion proves incorrect"); *Kiobel v. Royal Dutch Petroleum Co.*, 456 F. Supp. 2d. 457, 468 (S.D.N.Y. 2006) (granting certification pursuant to § 1292(b) where the parties' "effort and expense would be for naught if the Court [were] incorrect in its conclusions as to the viability of [a party's] claims"); *Teletronics*, 690 F. Supp. at 176 (finding certification will materially advance the ultimate termination of the litigation where it would "eliminate the possibility of a time-consuming and expensive retrial"). Instead of wasting resources on an unnecessary trial before the inevitable appeal, it makes more sense for the Court and the parties to litigate the inevitable appeal now.

An immediate appeal will advance the ultimate termination of the litigation also by enhancing the likelihood of a settlement. Presently, given the Opinion's impact on the parties' respective positions, Mr. Kozlowski has little practical choice other than to keep litigating until the Opinion can be appealed (whether that is now or only after an expensive but relatively inconsequential trial). *See Collins v. Promark Products, Inc.*, 763 F. Supp. 1206, 1208 (S.D.N.Y. 1991) ("[T]his is the type of litigation which usually settles as soon as the parameters of legal liability are established. Accordingly, we can say with some confidence that an immediate appeal would in all probability materially advance the ultimate termination of the action.").

In sum, an appeal advances the ultimate termination of a litigation where, as here, the issues to be appealed have a significant practical impact on the action. *See N.Y. Racing Ass'n*, 959 F. Supp. at 584 ("[I]mmediate appellate review of the[] Order[] will materially advance the outcome of this litigation . . . because many of the Defendant['s] counterclaims in this case are either premised upon, or related to, the . . . issues addressed in the Court's [Opinion]."). In this case, no issue could have a greater practical impact than the choice-of-law question Mr. Kozlowski seeks to appeal. It is self-evident that the resolution of such a key issue – which has such a dramatic impact on the parties' respective positions – will advance the ultimate termination of a litigation.

II. Partial Final Judgment Pursuant To Rule 54(b) Should Be Entered On Mr. Kozlowski's Counterclaims.

Rule 54(b) allows a court to enter final judgment, thereby permitting immediate appeal, on one or more claims prior to resolution of all claims in a multi-claim case. Specifically, Rule 54(b) states:

> When an action presents more than one claim for relief, . . . the court may direct the entry of a final judgment as to one or more,

> but fewer than all, claims . . . only if the court expressly determines that there is no just reason for delay.

To permit entry of final, immediately appealable, Rule 54(b) judgment, there must be (*i*) multiple claims or multiple parties, (*ii*) at least one claim finally decided within the meaning of 28 U.S.C. § 1291, and (*iii*) an express determination by the district court that there is no just reason for delay. *Ginett v. Computer Task Grp., Inc.*, 962 F.2d 1085, 1091 (2d Cir. 1992). "It is left to the sound judicial discretion of the district court to determine the appropriate time when each final decision in a multiple claims action is ready for appeal" and such "discretion is to be exercised in the interest of sound judicial administration." *Curtiss-Wright Corp. v. Gen. Elec. Co.*, 446 U.S. 1, 8 (1980) (internal citations and quotations omitted). Entry of final judgment is appropriate under these standards with respect to Mr. Kozlowski's counterclaims.

The first prong of the *Ginett* test is satisfied because Mr. Kozlowski and Tyco have each asserted numerous claims and counterclaims in this action.

The second prong of the *Ginett* test is also satisfied because Mr. Kozlowski's counterclaims have been finally decided. A judgment is final for the purposes of Rule 54(b) if it is an ultimate disposition on a cognizable claim for relief. *Curtiss-Wright Corp*, 446 U.S. at 7. The Opinion has unambiguously dismissed all of Mr. Kozlowski's counterclaims seeking to vindicate his rights under various severance agreements and deferred compensation plans accruing at any time after September 1995. Opinion at 23-27. No disposition could be more definitive. The Opinion "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Ginett*, 962 F.2d at 1092.[2]

The third prong of the *Ginett* test is also satisfied because there is no just reason for delay in entering judgment. In determining whether just reason for delay exists, "[t]he proper guiding star . . . is 'the interest of sound judicial administration.'" *Ginett*, 962 F.2d at 1095 (quoting *Curtiss-Wright Corp.*, 446 U.S. at 8). The Court must balance the factors affecting judicial efficiency, and no single consideration should control. *Curtiss-Wright Corp.*, 446 U.S. at 8 n.2 (stating, as an example, that even if "there was a possibility that an appellate court would have to face the same issues on a subsequent appeal, this might perhaps be offset by a finding that an appellate resolution of the certified claims would facilitate a settlement of the remainder of the claims").

Here, judicial efficiencies warrant immediate entry of final judgment on Mr. Kozlowski's counterclaims for reasons very similar to those addressed by this Court in a previous case. In *Deltor Corp. v. Gardner*, this Court entered an order deciding cross-motions for summary judgment which resolved the parties' key claims and counterclaims but left open several less important issues for trial. No. 91 CIV. 8424 (TPG), 1995 WL 679262, at *1 (S.D.N.Y. Nov. 15, 1995) (Griesa, C.J.). The Court granted final judgment under Rule 54(b), holding that "it would be highly desirable to have an appellate ruling at this juncture about the basic issue" since the remaining claims "involve issues of much lesser importance than what is covered by the summary judgment ruling" and would "undoubtedly be settled or otherwise disposed of quite easily" after an appeal. *Id.*; *see also Olin Corp. v. Ins. Co. of N. Am.*, 972 F. Supp. 189, 191 (S.D.N.Y. 1997) (Griesa, C.J.) ("A partial judgment, embodying the rulings to be made by the court at this juncture is proper" under Rule 54(b) because it "will enable the parties to take an immediate appeal from these rulings [and] . . . will assist in the ultimate resolution of this large lawsuit.").

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[2] While the Opinion leaves open the question of whether Mr. Kozlowski is entitled to recovery of any contributions he made to the DCP between March 1994 and September 1995 and of any contributions he made to the SERP between January and September of 1995, that open question does not change the fact that there has been a final determination of all Mr. Kozlowski's rights advanced by his counterclaims accruing after 1995. A "claim" for purposes of Rule 54(b) is not equivalent to a "cause of action" in a pleading. Rather, a "claim" for these purposes refers to a discrete claim for relief. *Advanced Magnetics, Inc. v. Bayfront Partners, Inc.*, 106 F.3d 11, 21 (2d Cir. 1997). Here, there has been a final determination on Mr. Kozlowski's claims for recovery of the compensation he deferred to his DCP and SERP accounts after September 1995. Alternatively, even if Mr. Kozlowski's claims related to the DCP and SERP accounts are not considered to be finally determined, there is no question that all of his other counterclaims have been finally determined.

The same considerations are present here. Absent an interlocutory appeal, the Court and the parties will be forced to expend resources on an expensive trial involving relatively inconsequential issues before Mr. Kozlowski has the opportunity to appeal the issues of real significance. If Mr. Kozlowski's appeal at that point is successful, the Court and the parties will have to conduct a second trial on a much broader and more consequential set of issues (including all of Mr. Kozlowski's counterclaims). The first trial will have been a wasted effort. Avoiding the potential for an unnecessary trial is a compelling efficiency consideration warranting entry of final judgment under Rule 54(b). *See, e.g., Advanced Magnetics, Inc. v. Bayfront Partners, Inc.*, 106 F.3d 11, 16-17 (2d Cir. 1997) (entering final judgment on certain claims under Rule 54(b) in order to allow a choice-of-law issue to be appealed immediately, thus potentially avoiding "an expensive and duplicative trial"); *Trugman-Nash, Inc. v. N.Z. Dairy Bd.*, 954 F. Supp. 733, 738

(S.D.N.Y. 1997) (granting Rule 54(b) judgment will allow immediate appeal to determine if certain "claims form a proper part of this case, [since] a single trial of all claims is preferable").

In addition, while settlement is highly unlikely before an appeal, the prospects for settlement will improve after an appeal (whether that appeal is taken now or only after trial of the remaining issues). Encouraging settlement is also an important consideration favoring the entry of a Rule 54(b) final judgment. *Curtiss-Wright Corp.*, 446 U.S. at 8 n.2.

Entry of Rule 54(b) final judgment on Mr. Kozlowski's counterclaims is particularly appropriate because those claims are entirely unrelated to the remaining issues to be tried in the case. *See Ginett*, 962 F.2d at 1096 ("Only those claims 'inherently inseparable' from or 'inextricably interrelated' to each other are inappropriate for rule 54(b) certification."). Claims are not too interrelated for purposes of Rule 54(b) if they "can be decided independently of each other." *Siemens Westinghouse Power Corp. v. Dick Corp.*, 220 F.R.D. 232, 234 (S.D.N.Y. 2004) (quoting *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 436 (1956)).

In this case, Mr. Kozlowski's counterclaims are not "inherently inseparable" from or "inextricably interrelated" to the issues remaining on Tyco's claims since they are completely factually distinct. Mr. Kozlowski seeks a final judgment on his counterclaims to vindicate his rights under various severance agreements and deferred compensation plans. The remaining issues to be tried, by contrast, predominantly involve the damages Tyco claims to have suffered as a result of Mr. Kozlowski's conduct. Because the factual elements between the claims requested for final judgment and the claims that will remain pending do not meaningfully overlap, "[n]othing that will be aired at trial can be expected to shed light on the . . . questions" to be appealed, making entry pursuant to Rule 54(b) appropriate. *Advanced Magnetics*, 106 F.3d at 17; *see also Ginett*, 962 F.2d at 1097 ("In short, we will not on this appeal be deciding any issues which remain for decision in the district court, and nothing the district court can later do on the remaining two claims can alter our decision today.").

CONCLUSION

For the reasons stated above, Mr. Kozlowski respectfully requests that the Court certify the Opinion for interlocutory appeal, pursuant to 28 U.S.C. § 1292(b), and direct final judgment as to Mr. Kozlowski's counterclaims, pursuant to Fed. R. Civ. P. 54(b).

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Respectfully submitted,
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